No. 12763

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

A. A. SEE and C. M. COSTNER,
Co-partners, doing business as
COSTNER & SEE,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE PEIRSON M. HALL, *Judge*

REPLY BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney
JOHN E. BELCHER
Assistant United States Attorney

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

BALLARD NEWS, SEATTLE, WASHINGTON -- 3/29/51 -- 45 COPIES

No. 12763

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

A. A. SEE and C. M. COSTNER,
Co-partners, doing business as
COSTNER & SEE,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE PEIRSON M. HALL, *Judge*

REPLY BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney
JOHN E. BELCHER
Assistant United States Attorney

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

BALLARD NEWS, SEATTLE, WASHINGTON -- 3/29/51 -- 45 COPIES

INDEX

UNITED STATES CODE

U. S. STATUTES

FEDERAL REGISTER

PRIORITIES REGULATIONS

TABLE OF CASES

No. 12763

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

A. A. SEE and C. M. COSTNER,
Co-partners, doing business as
COSTNER & SEE,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE PEIRSON M. HALL, *Judge*

REPLY BRIEF OF APPELLANT

STATEMENT

While counsel for appellees say at the beginning of their brief that the Act of Congress upon which this action must rest is the Veterans Emergency Housing Act of 1946 (60 Stat. 207, Title 50 App. 86) the Second War Powers Act and the Executive

Orders issued thereunder, and the various priority regulations, they studiously ignore Priorities Regulation 33 (11 F. R. 601) which was promulgated under the Second War Powers Act, as amended.

The jurisdiction to enforce the provisions of the Act and the regulations thereunder is derived from sub-paragraph six of Section 633, Title 50 App. U. S. C. A., which provides in its applicable portion:

> "The District Courts of the United States * * * shall have jurisdiction of the violations of this sub-section (a) or any rule, regulation, or order or subpoena thereunder whether heretofore or hereafter issued, and of all civil actions under this sub-section (a) *to enforce any liability or duty created by law*, or to enjoin any violation of this section (a) or any rule, regulation or subpoena thereunder whether heretofor or hereafter issued. * * * Any civil action may be brought in any such district or in the district in which the defendant resides or transacts business."

Nothing whatever is said concerning jurisdictional amount.

Section 5 of the act (60 Stat. 210) provided:

> "It shall be unlawful for any person to effect * * * a sale of any housing accommodations at a price in excess of the maximum sales price applicable to such sale under the provisions of this Act * * *. It shall be unlawful for any person to violate the terms of any regulation or order issued under the provisions of this Act.

> * * * Notwithstanding any termination of this Act as contemplated in Section 1 (b) hereinabove, the provisions of this Act, and of all regulations and orders issued thereunder, shall be treated as remaining in force, as to the rights or liabilities incurred * * * prior to such termination date, for the purpose of sustaining any proper suit, action or prosecution with respect to any such right, liability or offense."

This being a special Act, its provisions are controlling over the general act (Title 28, U.S.C., Sec. 1332).

The Priorities Regulation 33, by Sec. 944.54, reads: What this regulation does:

> "(a) This regulation sets up the Reconversion Housing program of the Civilian Production Administration.
>
> "It is designed to assist private builders, educational institutions and others to build moderate cost housing accommodations to which veterans of World War II will be given preference, by giving a H.H. preference rating for certain building materials for the construction. The regulation describes the methods of applying for H.H. rating, the circumstances under which the rating will be assigned, the materials for which it will be given and the conditions imposed on the builder and succeeding owners in selling or renting the accommodations as long as this regulation is in force. * * *
>
> "(b) Applications. A person who wishes to build, complete or convert moderate cost housing accommodations under the Reconversion Housing Program may apply on Form C.P.A.-4386 for an H.H. preference rating for materials of

the kinds listed in Schedule A which are needed for the project. The application should be filed with the appropriate State or District Office of the Federal Housing Administration. * * *

"(d) Use and effect of H.H. ratings:

1. The H.H. rating assigned for a project may be used only to get materials of the kind listed on Schedule A of this regulation which are required for the project. The rating may be applied to a purchase order only by placing on the order the following certificate (the certificate set forth in Priorities Regulations 3 and 7 may not be substituted for this certificate).

Appellees, builders, made application to the Federal Housing Administration for priorities assistance in constructing the two houses here involved in the manner and form and on the form specified in paragraph (b) of Priorities Regulation 33.

ARGUMENT IN ANSWER TO APPELLEES

The Federal Housing Administration was the agency authorized by law to fix the maximum sales prices for dwellings constructed with priorities assistance under Priorities Regulation 33. In this case it fixed the maximum sales price of each dwelling at $6750.00 each, including the land. Appellees charged and collected from each veteran purchaser $8500.00, making an overcharge on each dwelling of $1750.00.

Priorities Regulation 33 provides in pertinent portions:

(We have heretofore set out herein paragraphs (b) and (d).

Paragraph (e) provided:

"(e) Construction of the project.

A builder who uses the H.H. rating to get materials for housing accomodations must construct them in accordance with the description given in the application, except where he has obtained from the Federal Housing Administration approval for a change from the application.

"(ii) *A builder must not sell a one-family dwelling built * * * under the Reconversion Housing Program, including the land and all improvements* (including garage if provided) *for more than the maximum sales price specified in the application, including within this sales price the amount of any brokerage fees or commission paid in connection with the sale, whether paid by the builder or the purchaser.*" (11 F.R. 601-604) (Italics ours)

The regulation by paragraph 7 provides that the builder, under certain conditions may make a request for increase in the sales price. No such request was made in this case.

Counsel for appellees say the complaint is based on the naked fact of an apparent excess in selling price over the maximum set by the Expediter's Of-

fice *entirely without regard to whether or not appellees actually made any profit whatever over their cost of building.*

Again, at p. 4, counsel say: "the veteran purchaser of one of the houses has subsequently resold the house at a profit to himself over the alleged excessive purchase price, and that the veteran purchaser of the other house has refused to re-sell it to appellees for the amount of the purchase price, but has offered it for re-sale at a figure $2000.00 higher."

There is absolutely nothing in the record to justify such extravagant statements.

Such argument has no place on this appeal. If true, it is a matter of defense in a proper case, but has absolutely no value here.

It is argued that the Government here is seeking recovery of money for the benefit of private persons. (Br. 4). This is incorrect. The Government, as this Court well knows, puts up, by way of loan to the veteran, the entire amount of the purchase price, and through the F.H.A. and other agencies advances this money to the particular bank taking the mortgage, and in this District at least any recovery made is paid into the registry of the court, and thereafter disbursed to the banking institution holding the mortgage. In other words, the Government gets back

a part of that which it originally loaned the veteran.

The prayer of the complaint was for equitable relief.

Counsel say (Br. 5) that the lower court, "declined to entertain this suit, or to assume jurisdiction."

This is the assumption of counsel, because there is nothing in the written order of dismissal (R. 12) which in the slightest degree indicates what counsel say was the ground upon which the motion to dismiss was granted.

The grounds of appellees' motion to dismiss are set up at pp. 5-6 of the brief.

At p. 6, counsel say the question presented on appeal is:

> " * * * whether it must be held as a matter of law that the lower court erred *in declining to entertain equity jurisdiction in this case.* More specifically, was the granting of the motion for dismissal neither proper under applicable law, nor justifiable in the exercise of equity prerogatives and discretion, if granted upon any one or all of the grounds and propositions * * *."

This question it seems to us is foreclosed by the cases of *Bowles v. Skaggs*, 151 F. (2d) 817; *U. S. v. Carter*, 171 F. (2d) 530, and *Keele v. United States*, 178 F. (2d) 766.

The Court did exercise jurisdiction in this case and we may properly assume that he concluded that the complaint did not state a cause of action on which relief may be granted.

In the case of *Bell v. Hood*, 327 U.S. 678, 682, the U. S. Supreme Court said:

> "Thus allegations far less specific than the ones in the complaint before us have been held adequate to show that the matter in controversy arose under the Constitution of the United States. *Wiley v. Sinkler*, 179 U.S., 58, 65-5; *Swafford v. Templeton*, 185 U.S. 487, 491-92.
>
> "The reason for this is that the Court must assume jurisdiction to decide whether the allegations state a cause of action on which the Court can grant relief as well as to determine issues of fact arising in the controversy.
>
> "Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact, it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. *Swafford v. Tem-*

pleton, 185 U.S. 487, 493-4; *Binderup v. Pathe Exchange*, 263 U.S. 291, 301-8."

See also *Illinois Central R. Co. v. Adams*, 180 U. S. 28; *Geneva Furniture Co. v. Karpen*, 238 U.S. 254.

Counsel also argue that the one year limitation in Sec. 7 of the Veterans Emergency Housing Act of 1946 is applicable here.

This question is likewise foreclosed by the decisions of various District Courts.

U. S. v. Craig, No. 1331 N.D. Mex. 11/8/48, unreported;

U. S. v. Hartupee, No. 6444 E.D. Mo. E. Div. 4/24/50, unreported;

U. S. v. Shaw Tenenbaum Const. Co., Inc., No. 5897, 9 F.R. Dec. 533;

Keele v. Holt, 171 F. (2d) 480;

Blood v. Fleming, 161 F. (2d) 292;

Creedon v. Randolph, 165 F. (2d) 918;

U. S. v. Beebe. 127 U.S. 338, 344.

There is no merit whatever in the point made by counsel for appellees at p. 11 of their brief that in this type of suit that there must be involved $3000.00. Counsel cite as sustaining authority the case of *Adams v. Albany*, 80 F. Supp. 876.

In that case District Judge Yankwich, at p. 879 said:

> "As the forty-one first causes of action are brought under the Housing Act, they are causes of action arising under a statute of the United States. This being the case, unless the Act establishing the action specifically grants to the district courts jurisdiction *regardless of the amount involved*, the general rule which makes our jurisdiction dependent upon the presence of both Federal question and a jurisdictional minimum of three thousand dollars applies."
> (28 U.S.C.A., 1332)

In that case, the veterans brought the action themselves, but did not commence it within the one-year period of limitation prescribed in the act.

The rule is different and an entirely different statute is involved where the suit is instituted by the United States.

Title 28, Section 1345, U.S.C. provides:

> "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

DISTRICT COURT'S JURISDICTION REGARDLESS OF AMOUNT INVOLVED

The following cases definitely settle, we believe the question of jurisdictional amount in cases of this nature:

Fields v. Washington, (3 Cir.) 173 F. (2d) 701;
Wood v. Bombay, (3 Cir.) 179 F. (2d) 565;
Woods v. Kern, 181 F. (2d) 499.

In *Woods v. Richman*, (9 Cir.) 174 F. (2d) 614, *Porter v. Warner Holding Co.*, 328 U.S. 395, is cited as authority for holding that restitution may be had for overcharges in rentals.

In that case the District Court had dismissed the action of the Housing Administrator and in reversing, this Court said (P. 616):

> "We think, therefore, that it continues to be appropriate for the Courts to consider whether an order of restitution should be made as a means of giving effect to the declared policy of Congress.
>
> "The judgment appealed from is accordingly reversed and the cause remanded with directions to the Court to hear the evidence, and, in the light thereof to exercise the discretion which belongs to the Court."

CONCLUSION

It is respectfully submitted that the district court erred in dismissing this action and its judgment should be reversed.

Respectfully submitted,

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney